

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 29, 2016

**Elisabeth A. Shumaker
Clerk of Court**

In re: SHAWN SCHILLINGER ALLRED,
a/k/a Shawn Lee Allred,

Movant.

No. 16-4107
(D.C. Nos. 2:08-CV-00245-CW &
2:03-CR-01011-DB-1)
(D. Utah)

ORDER

Before **BRISCOE**, **GORSUCH**, and **BACHARACH**, Circuit Judges.

Shawn Schillinger Allred was convicted by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and possession of an unregistered sawed-off shotgun, in violation of 26 U.S.C. § 5861(d). The district court sentenced him to 188 months' imprisonment. After we affirmed his sentence on appeal, Allred moved unsuccessfully to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He now seeks authorization to file a second or successive § 2255 motion challenging his sentence. We grant the motion.

To obtain authorization, a proposed § 2255 motion must rely on “(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense,” or “(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h). Allred must make a prima facie showing

that he can satisfy one of these gate-keeping requirements. *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(C).

Allred invokes the second prong of § 2255(h), pointing to the Supreme Court’s holding in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). *Johnson* voided, in part, the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act. *Id.* at 2563. *Johnson* held that a “residual clause” in the definition—covering crimes “involv[ing] conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii)—violated the constitutional prohibition against vague criminal laws and that an increased sentence based on that clause violates a defendant’s right to due process. *Johnson*, 135 S. Ct. at 2557, 2563. The Supreme Court made *Johnson*’s holding retroactive to cases on collateral review in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1265 (2016).

We have extended *Johnson*’s holding to identical residual-clause language in the definition of a “crime of violence” in the career-offender guideline, U.S. Sentencing Guidelines Manual § 4B1.2(a)(2) (U.S. Sentencing Comm’n). *See United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015). And we have authorized a second or successive § 2255 motion challenging a sentence that was enhanced based on that guideline as “sufficiently based on *Johnson* to permit authorization under § 2255(h)(2).” *In re Encinias*, 821 F.3d 1224, 1226 (10th Cir. 2016).

The district court found that Allred was as an armed career criminal based on three previous convictions that qualified as violent felonies under the ACCA. Allred had been convicted in state court in Utah of burglary of a dwelling, burglary of a non-dwelling, and

escape. His status as an armed career criminal triggered the statutory mandatory minimum 15-year sentence under the ACCA. *See* 18 U.S.C. § 924(e)(1). That status *also* made him subject to the armed-career-criminal guideline, USSG § 4B1.4 (2004),¹ pursuant to which his total offense level was calculated as the greater of 34 or the offense level applicable from Chapters Two and Three of the guidelines. Allred's total offense level under Chapters Two and Three was also 34, but that number was calculated, in part, based on a finding that Allred had at least two prior felony convictions of a crime of violence. *See* USSG § 2K2.1(a)(1).² Section 2K2.1(a) uses the definition of "crime of violence" in § 4B1.2(a)(2), including its residual clause. *See* USSG § 2K2.1 cmt. n.1.

Allred alleges that his sentence was enhanced by application of the residual clauses in the definitions of "violent felony" in the ACCA and "crime of violence" in USSG § 4B1.2(a). We cannot definitively discern otherwise from the record.

The government argues that Allred does not have a claim based on the holding in *Johnson* because his sentence was not affected by the 15-year/180-month statutory minimum sentence applicable to an armed career criminal. The government points to our decision in Allred's direct appeal, in which he argued that one of his previous convictions did not qualify as a violent felony under the ACCA. We declined to reach the merits of that issue, holding instead that any error by the district court in applying § 924 was harmless because that section did not affect Allred's sentence. As we explained:

¹ The 2004 version of the guidelines was applied in this case.

² The enhancement under § 2K2.1(a)(1) can be applied if the defendant has two or more prior convictions of *either* a crime of violence *or* a controlled substance offense. The parties agree that Allred's enhancement was based on previous convictions deemed to be crimes of violence.

The judge's reasoning during the sentencing hearing makes clear that Allred would have received the same sentence—188 months—even if the § 924 mandatory minimum of 180 months did not apply.

At sentencing, the district court started with a United States Sentencing Guidelines range of 262 to 327 months based on Allred's offense level and criminal history. The court then offered to let Allred accept responsibility to reduce the range from a low end of 262 to a low end of 188. Although the court also believed at sentencing that the mandatory minimum penalty under § 924 would apply, in the end, the fifteen-year minimum did not factor into the calculation of Allred's sentence. Instead, the court based its sentence entirely on the advisory Guidelines. As the court noted at sentencing, [t]he guidelines indicate a sentence of above 15 years even with the acceptance of responsibility. The court ultimately rejected Allred's request to base his sentence on the fifteen-year mandatory minimum rather than the Guidelines.

United States v. Allred, 218 F. App'x 784, 786 (10th Cir. 2007) (citations and internal quotation marks omitted). In reaching this holding, we noted that Allred did not raise any claim of error in the calculation of his guidelines sentence in his direct appeal. *See id.*

Thus, if Allred were now seeking to challenge only the application of the 15-year minimum sentence under the ACCA, we would apply the law of the case and hold that his claim based on *Johnson* is foreclosed by our decision in his direct appeal. But we do not, as the government urges, consider only Allred's counseled motion for authorization. Allred also filed two pro se pleadings seeking authorization to file a motion based on *Johnson*. Read together, his three filings challenge both his designation as an armed career criminal under the ACCA and his guidelines sentence, to the extent that either or both were affected by application of the now-invalidated residual clause language in the relevant definitions of "violent felony" and "crime of violence."

Accordingly, we grant Allred authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson*. In the interest of justice, we

direct the Clerk to transfer to the district court for the District of Utah, pursuant to 28 U.S.C. § 1631, Allred's three filings in support of his motion for authorization in this court.³ If the district court concludes these filings are insufficient to constitute a § 2255 motion raising a *Johnson* claim, it should permit Allred to supplement the filings using the district court's preferred format and/or forms. Allred's now-authorized successive § 2255 motion shall proceed in the district court as though filed on June 14, 2016, the date of Allred's original filing in this court.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk

³ Allred's three filings were docketed in this court on June 14, June 20, and June 24, 2016.